



International Tribunal for the  
Prosecution of Persons  
Responsible for Serious Violations  
of International Humanitarian Law  
Committed in the Territory of the  
former Yugoslavia since 1991

Case No.: IT-05-88-T

Date: 22 September 2008

Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge Carmel Agius, Presiding  
Judge O-Gon Kwon  
Judge Kimberly Prost  
Judge Ole Bjørn Støle – Reserve Judge

**Registrar:** Mr. Hans Holthuis

**Decision of:** 22 September 2008

**PROSECUTOR**

v.

**VUJADIN POPOVIĆ  
LJUBIŠA BEARA  
DRAGO NIKOLIĆ  
LJUBOMIR BOROVIČANIN  
RADIVOJE MILETIĆ  
MILAN GVERO  
VINKO PANDUREVIĆ**

***PUBLIC***

**DECISION ON BOROVIČANIN'S MOTION FOR ADMISSION OF  
WRITTEN EVIDENCE PURSUANT TO RULE 92 *BIS***

**Office of the Prosecutor**

Mr. Peter McCloskey

**Counsel for the Accused**

Mr. Zoran Živanović and Ms. Mira Tapušková for Vujadin Popović  
Mr. John Ostojić and Mr. Predrag Nikolić for Ljubiša Beara  
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić  
Mr. Aleksandar Lazarević and Mr. Christopher Gosnell for Ljubomir Borovčanin  
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Radivoje Miletić  
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero  
Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević

**THIS TRIAL CHAMBER** of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”);

**BEING SEISED OF** “Borovčanin Defence Motion for Admission of Written Evidence in lieu of Oral Testimony pursuant to Rule 92 *bis*, with Annexes I to III”, filed confidentially on 19 May 2008 (“Motion”), in which Borovčanin requests the admission of the written evidence of three witnesses pursuant Rule 92 *bis*;

**NOTING** the “Prosecution Response to Confidential Borovčanin Defence Motion for Admission of Written Evidence in lieu of Oral Testimony pursuant Rule 92 *bis*, with Annexes I to III”, filed confidentially on 2 June 2008 (“Response”), in which the Prosecution argues that the written evidence should not be admitted pursuant to Rule 92 *bis* and, alternatively, that if admitted, the Prosecution should be given an opportunity to cross-examine the witnesses;

**NOTING** the “Borovčanin Request for Leave to Reply and Reply, with Annex, to Prosecution Response to Borovčanin Defence Motion for Admission of Written Evidence in lieu of Oral Testimony pursuant Rule 92 *bis*”, filed confidentially on 10 June 2008 (“Reply”), in which Borovčanin moves to withdraw Witness 4DW-11 from its Rule 65 *ter* Witness List and from the Motion,<sup>1</sup> and reiterates that the written evidence of the other two witnesses should be admitted;

**NOTING** that in the Motion, Borovčanin requests the admission of the transcript testimony of Witness 4DW-5,<sup>2</sup> who gave evidence in *Prosecutor v. Blagojević and Jokić*,<sup>3</sup> arguing that:

- a. the witness’s testimony on the situation in the area around Potočari on 12 July 1995 is cumulative to evidence heard in the Prosecution case and similar to the evidence of four witnesses Borovčanin intends to hear *viva voce* in its case;<sup>4</sup>
- b. the witness’s testimony on visiting the Kravica Warehouse on 13 July 1995 is corroborative and cumulative of the evidence of Zoran Petrović whose testimony was heard in the Prosecution case,<sup>5</sup>

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<sup>1</sup> Reply, para. 2.

<sup>2</sup> Including two exhibits used to illustrate his testimony, P162 and P163, as attached. Motion, para. 11 and Annex I.

<sup>3</sup> *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, T. 3347–3393.

<sup>4</sup> Witnesses 4DW-2, 4DW-4, 4DW-6 and 4DW-15. Motion, para. 7. It is alleged that the witness testimony is cumulative to the evidence of Zoran Petrović, in particular with regard to the evidence that he did not hear the sound of gunfire emanating from the Kravica Warehouse at the moment he was passing by in the car. *Ibid.*, paras. 9–10.

<sup>5</sup> Motion, paras. 8–10. *See also*, Zoran Petrović, T. 18730–18882 (4–6 December 2007). Concerning the Kravica Warehouse, specifically T. 18801–18803 (5 December 2007), T. 18860 (6 December 2007).

- c. the evidence does not go to the acts and conduct of Borovčanin or his “proximate or less proximate” subordinates;<sup>6</sup> and
- d. the Prosecution “led this evidence” in *Blagojević and Jokić* and should have impeached the witness then, if it thought his evidence unreliable;<sup>7</sup>

**NOTING** that Borovčanin requests the admission of the redacted<sup>8</sup> transcript<sup>9</sup> of Witness 4DW-13, who testified for the Defence in *Blagojević and Jokić*<sup>10</sup> arguing that:

- a. the witness’s testimony on the situation in Potočari on 11 July 1995, the condition of the Bosnian Muslim civilians at Potočari on 12 and 13 July 1995, as well as two meetings with General Mladić on 12 July 1995,<sup>11</sup> neither concerns the acts and conduct of the Accused, nor “specifically contradict[s] the Prosecution evidence, so as to be a live and important issue in the case”;<sup>12</sup> and
- b. the same counsel who represents the Prosecution in this case cross-examined the witness during this testimony in *Blagojević and Jokić*;<sup>13</sup>

**NOTING** that the Prosecution in its Response requests leave to exceed the word-limit for filings;<sup>14</sup>

**NOTING** that the Prosecution objects to the admission of both transcripts<sup>15</sup> and requests the Trial Chamber to order that both witnesses appear *viva voce*, or in the alternative for cross-examination,<sup>16</sup> arguing that:

- a. the testimony of Witness 4DW-5 involves “live and important issues” between the parties,<sup>17</sup> is not cumulative of the four *viva voce* witnesses proposed by Borovčanin,<sup>18</sup> does not

<sup>6</sup> Motion, para. 10.

<sup>7</sup> *Ibid.*, para. 10.

<sup>8</sup> This transcript should be redacted so as to exclude the witness mentioning the presence of Beara in Bratunac on 13 July 1995 (T. 7627 (lines 2–7), T. 7627 (lines 23–25), T. 7628 (line 1) and T. 7674 (lines 19–22)). *Ibid.*, para. 14.

<sup>9</sup> Borovčanin does not request the admission of an exhibit used during the testimony of 4DW-13 (*Blagojević and Jokić*, T. 7648–7651) yet attached it in electronic format to its Motion for completeness. *Ibid.*, para. 16.

<sup>10</sup> *Blagojević*, T. 7598–7682. See Motion, Annex III.

<sup>11</sup> *Ibid.*, paras. 14–15.

<sup>12</sup> *Ibid.*, para. 15.

<sup>13</sup> *Ibid.*, para. 15.

<sup>14</sup> Response, para. 2.

<sup>15</sup> The Prosecution also objects to the admission of the written evidence of 4DW-11, which Borovčanin moved to withdraw in his Reply, and which the Trial Chamber will not further address. Response, paras. 14–22.

<sup>16</sup> Response, para. 13.

<sup>17</sup> *Ibid.*, para. 7.

<sup>18</sup> *Ibid.*, paras. 8, 12.

corroborate Petrović's testimony,<sup>19</sup> is unreliable due to inconsistencies, both internal and with a previous statement by the witness,<sup>20</sup> addresses core elements of the Prosecution's case against Borovčanin,<sup>21</sup> and is tantamount to introducing evidence of the acts and conduct of the Accused;<sup>22</sup> and

- b. the redacted transcript of Witness 4DW-13 relates to "substantial and material" issues between the parties, such as the treatment, including the separation, of the Bosnian Muslims in Potočari and the detention of Bosnian Muslims in Bratunac, of such a substantial nature that a re-cross-examination is required,<sup>23</sup> and that the redacted parts of the transcript concern the whereabouts of Beara on 13 July 1995,<sup>24</sup> which goes to the acts and conduct of Beara and is not appropriate for admission pursuant Rule 92 *bis*,<sup>25</sup> and that, as the Prosecution was not aware of Beara's "alibi" defence when it cross-examined 4DW-13 in *Blagojević and Jokić*, it should be allowed to cross-examine the witness in this case;<sup>26</sup>

**NOTING** that Borovčanin in his Reply argues that:

- a. the testimony of Witness 4DW-5 concerning Kravica on 13 July 1995 does not go to the core elements of the Prosecution case, as it is "regular" crime-base evidence,<sup>27</sup> and that as the Prosecution's case is closed, the issue cannot be considered as "live and important" between the parties unless the proposed evidence genuinely contradicts the Prosecution's evidence,<sup>28</sup> that the fact that the Prosecution "deems the evidence to be unfavourable" should not be taken as determinative and that as the Prosecution has failed to present any evidence contradicting Witness 4DW-5 testimony, it cannot now claim that it will suffer any prejudice by the admission of the testimony,<sup>29</sup> that the evidence in no way touches the acts

<sup>19</sup> *Ibid.*, paras. 8–9. According to the Prosecution, none of the proposed "cumulative Defence witnesses" are corroborative of Zoran Petrović's testimony. *Ibid.*, para. 12.

<sup>20</sup> Response, para. 10, referring to the witness's interview with Prosecution's investigators on 30 June 2002.

<sup>21</sup> Such as Borovčanin's knowledge of the killings at Kravica Warehouse and his conduct on 13 July 1995 in light of this knowledge. *Ibid.*, para. 11.

<sup>22</sup> *Ibid.*, para. 11. In particular, the Prosecution states that "[i]ntroducing the proffered testimony with its implication that Borovčanin was not, nor had reason to become aware of the killings at the warehouse while they were taking place because of the lack of audible gunfire, is tantamount to introducing evidence of the acts and conduct of the Accused". *Ibid.*

<sup>23</sup> *Ibid.*, para. 20.

<sup>24</sup> *Ibid.*, paras. 23–24. According to the Prosecution, this "alibi defence" is provided by Witnesses 2DW-19 and 2DW-20. Prosecution Response to the 'Notice of Filing of Ljubiša Beara's Amended Rule 92 *bis* Witness List and Draft Witness Statements', 9 June 2008, paras. 1, 22, 24–26. *See also* Decision on Beara's Requests for Admission of Written Evidence in Lieu of *Viva Voce* Testimony, 10 July 2008, p. 3.

<sup>25</sup> Response, para. 25.

<sup>26</sup> *Ibid.*, para. 26.

<sup>27</sup> Reply, paras. 4–5. *See also* para. 10.

<sup>28</sup> *Ibid.*, paras. 6–8.

<sup>29</sup> *Ibid.*, para. 9.

and conduct of Borovčanin,<sup>30</sup> and that any inconsistencies in the transcript are “extremely minor” and would not be clarified by further examination or cross-examination;<sup>31</sup> and

- b. the redaction of the transcript of Witness 4DW-13—which Borovčanin characterises as pure crime-base evidence<sup>32</sup>—is appropriate under Rule 92 *bis*, and that similar redactions of portions of written statements or transcripts has previously been ordered by Trial Chambers and requested by the Prosecution itself,<sup>33</sup> and that the fact that the redacted parts are useful to the Prosecution’s case is not a basis for admitting those portions in contravention of Rule 92 *bis*;<sup>34</sup>

**NOTING** the requirements in Rule 92 *bis* (A) and the “Decision on Prosecution’s *Confidential* Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*”, issued on 12 September 2006;<sup>35</sup>

**NOTING** that, pursuant to Rule 92 *bis*, a Trial Chamber may admit a transcript of previous testimony of a witness in lieu of oral testimony where the evidence goes to proof of a matter other than the acts and conduct of the Accused as charged in the Indictment and that, where the evidence does not pertain to the acts and conduct of the Accused, Rule 92 *bis*(A)(i) and (ii) provide non-exhaustive lists of factors which may guide the Trial Chamber in the exercise of its discretion whether to admit evidence pursuant to the rule;<sup>36</sup>

**NOTING** that a Trial Chamber may admit a transcript of previous testimony of a witness in lieu of oral testimony, even where the evidence goes to proof of the acts and conduct of an Accused, provided the requirements of Rule 92 *ter* are satisfied;

**CONSIDERING** that the transcript of Witness 4DW-5 addresses live and important issues between the parties that relate to core elements of the Prosecution’s case against Borovčanin, and that it is appropriate to require Witness 4DW-5 to appear for cross-examination;

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<sup>30</sup> *Ibid.*, para. 10.

<sup>31</sup> *Ibid.*, paras. 11–15. Borovčanin attached the Prosecution’s 2002 Interview with the witness as an Annex to the Reply.

<sup>32</sup> *Ibid.*, para. 19.

<sup>33</sup> *Ibid.*, para. 17.

<sup>34</sup> *Ibid.*, para. 16.

<sup>35</sup> Decision on Prosecution’s *Confidential* Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*, 12 September 2006 (“12 September 2006 Rule 92 *bis* Decision”).

<sup>36</sup> 12 September 2006 Rule 92 *bis* Decision, paras. 7–16.

**CONSIDERING** that the transcript of Witness 4DW-13 relates to “substantial or material issues between the parties”, such that it is appropriate for Witness 4DW-13 to appear for cross-examination;

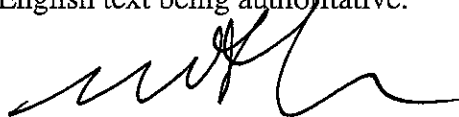
**CONSIDERING** that Witness 4DW-13 will be subject to cross-examination in conformity with the requirements of Rule 92 *ter*, and that there is no need to redact any portions of the transcript which implicate the acts or conduct of any Accused;

**PURSUANT TO** Rules 89, 92 *bis* and 92 *ter*,

**HEREBY GRANTS** the Motion and **ORDERS** as follows:

1. Borovčanin is granted leave to file the Reply.
2. The Prosecution is granted leave to exceed the word limit for filings:
3. The transcripts of Witness 4DW-5 and Witness 4DW-13 may be admitted pursuant to the requirements of Rule 92 *ter*.

Done in English and French, the English text being authoritative.



Carmel Agius  
Presiding

Dated this twenty-second day of September 2008  
At The Hague  
The Netherlands

[Seal of the Tribunal]